

---

Volume 46  
Issue 4 *Summer 1997: Symposium - Individual  
Rights and Reasonable Accommodations under  
the Americans with Disabilities Act*

---

Article 4

## **Insurance and the ADA**

Bonnie Poitras Tucker

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### **Recommended Citation**

Bonnie P. Tucker, *Insurance and the ADA*, 46 DePaul L. Rev. 915 (1997)  
Available at: <https://via.library.depaul.edu/law-review/vol46/iss4/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# INSURANCE AND THE ADA

Bonnie Poitras Tucker\*

## INTRODUCTION

This Article will examine some of the major issues involving insurance coverage under the Americans with Disabilities Act of 1990 ("ADA"). I will focus primarily on insurance in the employment setting (Title I), but this Article will also briefly discuss insurance issues under Title III. I will present an overview of the current state of the law under Titles I and III with respect to issues relating to insurance, as interpreted by regulatory agencies and the courts, and will discuss some current and potential areas of dispute.

The major policy issue is: to what extent, and in what manner, is the ADA intended to have an impact on insurance coverage? In typical law school fashion, this Article will raise many questions without providing any real answers.

## I. TITLE I—INSURANCE COVERAGE IN THE EMPLOYMENT SETTING

Title I of the ADA<sup>1</sup> prohibits an employer from discriminating against a person with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>2</sup> Further, Title I prohibits an employer from "participating in a contractual . . . relationship" that would prove discriminatory to an employee with a disability.<sup>3</sup> The provision of fringe benefits by an employer or the employer's contractor is expressly stated as falling within the coverage of Title I.<sup>4</sup>

---

\* Professor of Law, Arizona State University; J.D., University of Colorado School of Law; B.S., Syracuse University.

This Article is based on a presentation given on January 31, 1997, at *DePaul Law Review's* Symposium entitled *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act*.

1. 42 U.S.C. § 12112 (1994).

2. *Id.* § 12112(a).

3. *Id.* § 12112(b)(2).

4. *Id.* This section specifically states, "such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs." *Id.*

Prior to discussing specific substantive issues under Title I, a few preliminary matters must be addressed.

### A. *Qualifying as an Employee*

The first question to be addressed is who may assert an action against an employer to protest allegedly discriminatory insurance coverage. To fall within the protection of Title I, an individual must be a job applicant or employee of the defendant.<sup>5</sup> Several issues of dispute with respect to definition of an "employee" under Title I are relevant for insurance purposes. Independent contractors have been found not to be employees for purposes of the ADA.<sup>6</sup> Volunteer workers have been held not to be employees under Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>7</sup> Since Congress has stated that Title I is to follow Title VII principles,<sup>8</sup> the same reasoning should be held to apply under Title I.

#### 1. *Part-time Employees*

A major issue is whether a part-time employee can assert a claim against the employer to protest allegedly discriminatory health insurance coverage. The Equal Employment Opportunity Commission (EEOC), which is responsible for interpreting and enforcing Title I, takes the position that employers may require *all* employees, including employees with disabilities, to work a stated number of hours to be eligible for health insurance benefits.<sup>9</sup> According to the EEOC, it is not discriminatory to deny health insurance to part-time workers with disabilities as long as part-time workers without disabilities are also denied health insurance coverage.<sup>10</sup>

In accord with this reasoning, in *Tenbrink v. Federal Home Loan Bank*<sup>11</sup> the court held that an employer who accommodated an employee with chronic fatigue syndrome by allowing her to work part-time (less than thirty hours a week) did not violate the ADA by deny-

---

5. *Id.* § 12112(a).

6. *See, e.g., Robinson v. Bankers Life & Cas. Co.*, 899 F. Supp. 848, 849 (D.N.H. 1995) (stating that where plaintiff, an insurance agent, had a contract that stated he was an independent contractor and not an employee of the defendant employer, plaintiff could not assert a cause of action against the defendant under ADA Title I).

7. *See, e.g., Haavistola v. Community Fire Co.*, 839 F. Supp. 372, 373 (D. Md. 1994) (holding plaintiff volunteer fire fighters were not considered employees for purposes of Title VII).

8. *See, e.g., H.R. REP. NO. 101-485*, pt. 2, at 54, 76-77, 149 (1990); *see also* 29 C.F.R. § 1630 app. at 338 (1996).

9. Letter Re: Health Insurance, 8 NDLR ¶ 181 (EEOC June 6, 1995); *Gonzales*, 7 NDLR ¶ 136 (EEOC Jan. 4, 1995) (letter to the Honorable Harris Wofford).

10. *Gonzalez*, 7 NDLR ¶ 136.

11. 920 F. Supp. 1156 (D. Kan. 1996).

ing the employee medical benefits under a policy requiring any employee to work at least thirty hours a week to be eligible for group coverage.<sup>12</sup> In other words, the court held that it would constitute a reasonable accommodation to allow an employee with a disability to work part-time, but it would not constitute a reasonable accommodation to allow that employee to receive insurance benefits. This is a question of line drawing, of course. However, the ultimate outcome of this reasoning is that employees with disabilities may not be able to avail themselves of a requisite reasonable accommodation of part-time hours since to do so may mean they have to forfeit necessary insurance coverage. Is this logical reasoning?

## 2. Former Employees

Another issue is whether a former employee with a disability can sustain a claim against the employer to protest that employer's health insurance or disability benefits plan.

In *Gonzales v. Garner Food Services, Inc.*,<sup>13</sup> a former employee who was still covered by his former employer's insurance plan alleged that a cap on AIDS benefits was discriminatory under the ADA. The Eleventh Circuit held that the plaintiff "neither held nor desired to hold a position" with the company and was therefore not an employee who could bring a claim under Title I.<sup>14</sup> The court stated that "Congress intended to limit the protection of Title I to either employees performing, or job applicants who apply and can perform, the essential functions of available jobs which their employers maintain."<sup>15</sup>

Similarly, in *EEOC v. CNA Insurance Cos.*,<sup>16</sup> the Seventh Circuit held that a totally disabled former employee, who objected to the different levels of benefits provided in his former employer's long-term disability plan, could not assert a Title I claim against the employer.<sup>17</sup> The court rejected the EEOC's argument that the plaintiff's employment position was that of a "disability benefit recipient."<sup>18</sup> The Sev-

---

12. *Id.* at 1164.

13. 89 F.3d 1523, 1524 (11th Cir. 1996).

14. *Id.* at 1526.

15. *Id.* at 1527.

16. 96 F.3d 1039 (7th Cir. 1996).

17. *Id.* at 1040.

18. *Id.* at 1043-44. The court stated:

All employees—the perfectly healthy, the physically disabled, and the mentally disabled—had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

*Id.* at 1044 (citations omitted).

enth Circuit reasoned that collecting her benefit checks did not constitute a job function, and since the plaintiff had no job functions, she was not an employee or job applicant covered by Title I.<sup>19</sup> Thus, the plaintiff was held to lack standing to assert a claim against her former employer under Title I.<sup>20</sup> In *Parker v. Metropolitan Life Insurance Co.*,<sup>21</sup> the Sixth Circuit followed similar reasoning.

In *Northern v. City of Chicago*,<sup>22</sup> the court reached a contrary result. In that case, Chicago police officers receiving disability pensions from the city alleged that the city violated Title I when it amended its employee benefit plan with respect to their benefits.<sup>23</sup> The court rejected the city's argument that Title I does not apply to former employees.<sup>24</sup> Rather, the court held that retirement benefits are within the "compensation, terms, conditions, or privileges of employment" covered by Title I.<sup>25</sup> Further, the court found that there must only be an "employment relationship" for an individual to file an action under Title I; it is not necessary that the plaintiff be an "employee" per se.<sup>26</sup> Thus, the court denied the defendant's motion to dismiss the plaintiff's complaint.<sup>27</sup>

In addition, in *Graboski v. Guiliani*,<sup>28</sup> the court held that the plaintiffs, who were retired due to their disabilities, could sue their former employer under Title I to protest the employer's refusal to permit disability retirees to receive supplemental benefits that were to be awarded to employees who retired for nondisability-related reasons.<sup>29</sup>

---

19. *Id.* at 1044; see also *Foote v. Folks, Inc.*, 864 F. Supp. 1327 (N.D. Ga. 1994). In *Foote*, the court ruled that a woman with AIDS lacked standing to sue her ex-husband's former employer under Title I to challenge the employer's refusal to provide coverage for treatment of AIDS-related illnesses. 864 F. Supp. at 1329. The court stated that the woman's claim fell outside the "zone of interest" contemplated by the ADA, since the plaintiff was neither an employee or former employee of, nor a job applicant for a position in, the employer's business. *Id.*

20. *CNA Ins. Cos.*, 96 F.3d at 1045.

21. 99 F.3d 181, 186-87 (6th Cir. 1996), *vacated*, 6 Am. Disabilities Cas. (BNA) 547 (6th Cir. 1997) (holding that a former employee was not a qualified individual with a disability for standing to sue under the ADA where at the time she could perform essential functions of her job, she was not disabled, and at the time her benefits were terminated, she could no longer perform her job). It should be noted that after this presentation was given and the Article written, the Sixth Circuit vacated its 1996 opinion and has scheduled the case to be heard en banc. Oral argument is scheduled for June 11, 1997.

22. 841 F. Supp. 234 (N.D. Ill. 1993).

23. *Id.* at 235.

24. *Id.* at 236.

25. *Id.* (citation omitted). Specifically, the court noted that the "Seventh Circuit has held that retirement benefits are within the 'compensation, terms, conditions, or privileges of employment' covered under Title VII." *Id.* (citation omitted).

26. *Id.* (citation omitted).

27. *Id.*

28. 937 F. Supp. 258 (S.D.N.Y. 1996).

29. *Id.* at 267.

The employer, the City of New York, argued that the plaintiffs could not assert a Title I claim because they were no longer employees of the city.<sup>30</sup> As the court put it, the plaintiffs argued "that once plaintiffs retired on the basis of disability, the ADA no longer requires that they be treated evenhandedly."<sup>31</sup> In rejecting that reasoning, the court stated:

Such a crabbed view of the ADA's coverage would undermine the [ADA's] unambiguous remedial purpose. Title I of the ADA expressly prohibits discrimination in the provision of fringe benefits. . . . As certain fringe benefits (such as pensions and health insurance continuation) are meaningful only post-employment, it is only logical that the statute's coverage reaches the period when the employment benefits are to be reaped.<sup>32</sup>

The *Graboski* court also noted that the definition of an "employee" under the ADA is the same as that under Title VII and was intended to be given the same meaning as the Title VII definition.<sup>33</sup> The *Graboski* court cited numerous cases holding that under Title VII "discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct" is actionable."<sup>34</sup>

Other courts have held that employees who became totally disabled and were unable to work could file suit against their employers for allegedly discriminatory provisions in insurance or long-term disability plans. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*,<sup>35</sup> the First Circuit held that an individual with AIDS who was totally disabled and could no longer work had standing to bring an action alleging that his employer violated Title I because the employer's insurance benefits for AIDS-related illnesses were more limited than benefits for other illnesses.<sup>36</sup>

---

30. *Id.* at 265-66.

31. *Id.* at 266.

32. *Id.* (citations omitted).

33. *Id.* (citation omitted). With respect to the fact that ADA Title I is to follow Title VII principles, see H.R. REP. NO. 101-485, pt. 2, at 54, 76, 149 (1990); 29 C.F.R. § 1630 app. at 338 (1996).

34. 937 F. Supp. at 266. The court noted, however, that some courts, particularly the Fourth and Seventh Circuits, "reject the view that Title VII covers former employees." *Id.* at 266 n.12.

35. 37 F.3d 12 (1st Cir. 1994).

36. *Id.* at 17-18; see also *Schroeder v. Connecticut Gen. Life Ins. Co.*, No. CA-93-M-2433, 1994 WL 909636 (D. Colo. Apr. 22, 1994) (stating that the plaintiff could assert a claim under Title I against his former employer to protest the termination of his long-term disability benefits after 30 months due to the fact that his disability was mental rather than physical).

Other courts have held that plaintiffs who have claimed total disability for other purposes, such as in applications for disability benefits, are not "otherwise qualified individuals with disabilities" entitled to assert claims under Title I, however. See, e.g., *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996) (holding that an individual who swore that he was totally

Courts recognize that former employees can assert claims against their former employers with respect to issues other than insurance, such as wrongful discharge or wrongful refusal to reinstate an employee who ceased working due to disability but who is no longer disabled.<sup>37</sup> These types of cases differ from the insurance and disability benefits cases in that, in cases involving wrongful discharge or wrongful failure to reinstate, the plaintiffs are claiming that "but for" their former employers' discriminatory practices they *would* be active employees of those employers. Nevertheless, it is at least arguable that an employment relationship of sorts exists between employers and former employees who are receiving insurance or disability benefits from those former employers. The EEOC takes the position that that relationship, in and of itself, is sufficient for Title I purposes.

Further, with respect to long-term disability plans, the EEOC argues that "'most long[-]term disability benefits are reserved for those who are unable to hold any substantial employment for which they are qualified,'" and thus if individuals who are no longer actually employed are unable to file suit against their former employers for discriminatory treatment in disability plans "'virtually no employee could ever challenge discrimination in the provision of long-term disability benefits.'"<sup>38</sup> The EEOC's reasoning was expressly rejected by the Sixth Circuit in *Parker v. Metropolitan Life Insurance Co.*<sup>39</sup>

Currently, therefore, whether former employees may sue their former employers for allegedly discriminatory provisions in insurance or long-term disability plans remains an issue of dispute. Again, this is an issue of line drawing. However, treating former employees in this

---

disabled in applications for social security disability benefits and for exemption from repayment of educational benefits was estopped from filing suit under Title I to protest his allegedly discriminatory dismissal from employment); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996) (holding that an employee who represented that she was completely disabled for all work-related purposes was estopped from claiming she was not totally disabled and thus from filing suit under the ADA); *Esfahani v. Medical College*, 919 F. Supp. 832, 835-36 (E.D. Pa. 1996) (holding first that after employee became totally disabled, he lacked standing to assert that diagnoses-based differentiations in his employer's disability plan violated Title I and holding second that employee did have standing, however, to assert that while he was working, prior to becoming totally disabled, the employer's disability plan violated Title I). An in-depth analysis of this issue is beyond the scope of this Article.

37. See, e.g., *Anonymous v. Legal Servs. Corp.*, 932 F. Supp. 49, 50 (D.P.R. 1996) (noting that "the ADA would be of little use to wrongfully discharged plaintiffs if they could not invoke the law's protection"); *Lundstedt v. City of Miami* No. 93-1402-CIV, 1995 WL 852443, at \*6 (S.D. Fla. Oct. 11, 1995) (holding that an employee who retired due to a disability could still be eligible under the ADA for the employer's allegedly discriminatory failure to reinstate him to his prior position once his disability was eliminated).

38. *Parker v. Metro. Ins. Co.*, 99 F.3d 181, 186 (6th Cir. 1996), *vacated*, 6 Am. Disabilities Cas. (BNA) 547 (6th Cir. 1997).

39. *Id.* at 186-87.

manner clearly seems to defeat the purpose and spirit of the ADA by refusing to allow these employees, who have become unable to work due to their disabilities, to assert ADA claims against their former employers with respect to insurance benefits those former employees are currently receiving or are entitled to receive due to their former employment relationship.

### B. *The Substantive Law*

Section 501(c) of the ADA provides that insurers may underwrite, classify, or administer risks that are consistent with state law and may establish or observe the terms of bona fide benefit plans that are consistent with state law, as long as such insurance programs or benefit plans are not utilized as a subterfuge to circumvent the intent of the ADA.<sup>40</sup> The legislative history of the ADA notes that insurers may limit coverage based on "classification of risk[s]" and may refuse to insure, limit insurance, or charge a rate differential based on an individual's disability when such practice is "based on sound actuarial principles or is related to actual or reasonably anticipated experience."<sup>41</sup> If an insurance provision is based on sound actuarial principles, it will not constitute a subterfuge to circumvent the ADA.<sup>42</sup> The subterfuge language is the key to analyzing whether an insurance plan violates the ADA.

#### 1. *Disability-Based Distinctions*

Not all health-related distinctions discriminate on the basis of disability; only disability-based distinctions can be discriminatory.<sup>43</sup> Thus,

---

40. 42 U.S.C. § 12201(c) (1994); see 28 C.F.R. § 36.212 (1996).

41. H.R. REP. NO. 101-485, pt. 2, at 136-37 (1990). While disability-based distinctions based on legitimate actuarial standards may be permissible under the ADA, an employer cannot exclude an employee with a disability from its insurance coverage. An employer is required under ADA Title I to provide employees with disabilities with equal access to insurance coverage. In *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996), the insurance carrier for the employees of a retail store raised insurance premiums partly because one store employee, Anderson, developed AIDS and had a history of cancer. To avoid rising premiums, the employer sought to change its health insurance provider to one that the employer knew would not provide coverage to Anderson. *Id.* at 770. The court also held that unless the employer could show that providing Anderson with equal access to health insurance would constitute an undue hardship, which the court defined as "a concept approaching financial ruin," the employer would be found to have violated the ADA. *Id.* at 781. The court held that the employer's argument that the ADA permits disability-based distinctions based on actuarial risks was irrelevant since Anderson was not subject to a disability-based distinction in coverage but was denied coverage altogether. *Id.*

42. See EEOC *Interim Guidance on Application of ADA to Health Insurance*, Daily Lab. Rep. (BNA) No. 109, at E-3 (June 9, 1993) [hereinafter *Interim Guidance*].

43. See *id.* at E-1.



the first issue to resolve when determining whether a term or provision in a health insurance policy constitutes a subterfuge and, thus, violates Title I, is to determine whether it makes a *disability-based distinction*.<sup>44</sup> The EEOC has provided explicit guidance on what constitutes a "disability-based distinction."<sup>45</sup>

First, the EEOC opines that the following types of provisions in a health insurance plan *do not* constitute disability-based distinctions and thus do not violate Title I:

1. "[B]road distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on a disability."<sup>46</sup> Examples include plans that provide fewer benefits for "eye care" or "mental/nervous" conditions than for other conditions.<sup>47</sup> These are broad distinctions that affect both disabled and nondisabled individuals—both groups require eye care and may have mental or nervous conditions; thus, they are not disability-based distinctions—even though they may have a greater impact on some people with disabilities, such as people who are blind or mentally ill.<sup>48</sup> Consequently, the EEOC opines that such distinctions do not violate Title I.<sup>49</sup> In this regard, the EEOC explains that only disparate treatment, or intentional discrimination, in the context of insurance coverage will violate the ADA.<sup>50</sup> Distinctions in health insurance plans that have a disparate impact on people with disabilities do not violate the Act.<sup>51</sup>

In *Krauel v. Iowa Methodist Medical Center*,<sup>52</sup> the court followed the EEOC's reasoning in holding that an employer did not violate Title I by virtue of the fact that its health insurance plan did not pay for infertility treatments. The district court held that infertility is not a covered disability under the ADA, and thus the distinction applied to

---

44. *Id.* at E-1.

45. *Id.* at E-2. Note that the EEOC's Interim Guidance does not address long-term disability plans, pension plans, or life insurance plans, but only health insurance plans.

46. *Id.*

47. *Id.*

48. *Id.* This is in accord with cases decided under section 504 of the Rehabilitation Act. See, e.g., *Doe v. Colautti*, 592 F.2d 704, 708-10 (3d Cir. 1979) (concluding that section 504 does not require that the same level of benefits be provided for inpatient hospital treatment of mental illness as that provided for inpatient treatment of physical illness); *Doe v. Devine*, 545 F. Supp. 576, 585 (D.D.C. 1982) (concluding that cutbacks in mental health benefits but not physical health benefits did not violate section 504), *aff'd on other grounds*, 703 F.2d 1319 (D.C. Cir. 1983).

49. *Interim Guidance*, *supra* note 42, at E-2.

50. *Id.*

51. *Id.*

52. 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

both persons with and without disabilities and was not a disability-based distinction.<sup>53</sup> The Eighth Circuit affirmed.<sup>54</sup>

2. "Blanket pre-existing condition clauses" and "[u]niversal limits or exclusions from coverage of all experimental drugs and treatments, or all 'elective surgery,'" are not disability-based distinctions and thus do not violate the ADA.<sup>55</sup>

3. "[C]overage limits on medical procedures that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability" are not disability-based distinctions and thus do not violate the ADA.<sup>56</sup> This is true even though such limits may have a greater impact on some people with disabilities. Thus, for example, a limit on the number of blood transfusions for which an insurer will pay is not disability-based, even though the limit might have a greater impact on persons with hemophilia.<sup>57</sup>

The EEOC also provides guidance on what type of provision *does* constitute a disability-based distinction in a health insurance plan that may be found to violate the ADA.<sup>58</sup> The EEOC explains that a term or provision is "disability based" if it singles out:

- a. "a particular disability (*e.g.*, deafness, AIDS, schizophrenia);"
- b. "a discrete group of disabilities (*e.g.*, cancers, muscular dystrophies, kidney diseases);" or
- c. "disability in general (*e.g.*, non-coverage of all conditions that substantially limit a major life activity)."<sup>59</sup>

The first issue that must be determined when deciding whether a disability-based distinction is being made, therefore, is whether a distinction singles out a covered disability under the ADA. This requires us to determine whether a physical or mental condition is recognized as a covered disability under the ADA. Although a lengthy discussion

---

53. *Id.* at 111.

54. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996); *see infra* notes 68-72 and accompanying text (discussing whether infertility is a disability).

55. *Interim Guidance*, *supra* note 42, at E-2; *see also Gonzales*, 6 NDLR ¶ 395 (EEOC Nov. 16, 1994) (letter to the Honorable Herb Klein) (blanket preexisting clauses that exclude coverage for conditions that predate an individual's eligibility for benefits are not disability-based distinctions). Note, however, that the EEOC opines that a preexisting condition clause that applies only to treatment for one specific disability, as opposed to a clause prohibiting treatment for all preexisting conditions, is a disability-based distinction that may violate the ADA. *Interim Guidance*, *supra* note 42, at E-2.

56. *Interim Guidance*, *supra* note 42, at E-2.

57. *Id.*

58. *Id.*

59. *Id.*

of this topic is beyond the scope of this presentation,<sup>60</sup> a brief definition of the interpretive problem will be provided.

An individual is disabled under the ADA if he or she has a physical or mental impairment that *substantially limits a major life activity*, is regarded as having such an impairment, or has a record of having such an impairment.<sup>61</sup> The issue, therefore, is whether the individual's real, former, or perceived physical or mental impairment substantially limits a major life activity.

Some impairments, such as deafness, blindness, and schizophrenia, obviously substantially limit one or more of an individual's major life activities. Other impairments, epilepsy, for example, may or may not constitute a covered disability, depending on whether a major life activity of the individual is impacted. The EEOC notes that epilepsy is an impairment but is not a per se disability under Title I since "an individual with epilepsy is [only] covered by the ADA if the epilepsy currently substantially limits a major life activity."<sup>62</sup> It is recognized that "[e]pilepsy affects individuals differently. Thus, it must be determined on a case-by-case basis whether an individual's epilepsy substantially limits a major life activity."<sup>63</sup>

#### a. Reproduction-Infertility

Numerous issues and disputes have arisen with respect to what constitutes a covered disability under the ADA. For example, the EEOC's Title I regulations provide that pregnancy is not a disability under the ADA.<sup>64</sup> Several courts have agreed with that determination.<sup>65</sup> There is a split of authority, however, as to whether medical conditions arising as a result of pregnancy can constitute disabilities.<sup>66</sup>

---

60. For an in-depth analysis of this issue, see 2 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* 21:1-21:46 (1991 & Supp. 1996) (discussing who qualifies as disabled).

61. 42 U.S.C. §§ 12102(2)(A), (B), (C) (1994) (emphasis added).

62. Letter Re: Health Insurance, 8 NDLR ¶ 181 (EEOC June 6, 1995).

63. *Id.*; see also *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391 (S.D. Ind. 1995).

64. 29 C.F.R. § 1630.2 app. at 338-41 (1996).

65. See, e.g., *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149 (S.D. Tex. 1995) (holding that pregnancy and related medical conditions, absent unusual circumstances, are not physical impairments covered by the ADA); *Byerly v. Herr Foods, Inc.*, 61 Empl. Prac. Dec. (CCH) ¶ 42, 226 (E.D. Pa. 1993) (same).

66. Compare *Cerrato v. Durham*, 941 F. Supp. 388 (S.D.N.Y. 1996) (holding that pregnancy related disorders such as spotting, dizziness, and nausea—symptoms of a high-risk pregnancy—can constitute disabilities under the ADA), and *Garrett v. Chicago School Reform Bd. of Trustees*, No. 95-C-7341, 1996 U.S. Dist. LEXIS 10194, at \*7 (N.D. Ill. July 19, 1996) (allowing a plaintiff to proceed with her claim that morning sickness constitutes a disability under the ADA), with *Jessie v. Carter Health Care Ctr. Inc.*, 926 F. Supp. 613, 616 (E.D. Ky. 1996) (stating that a plaintiff who was advised as a result of her pregnancy not to lift more than 25 pounds did not

Similarly, there is a split of authority as to whether infertility, which is tangentially related to pregnancy, constitutes a disability under the ADA.<sup>67</sup>

As previously noted, in *Krauel*<sup>68</sup> the court held, contrary to the decisions of several other courts,<sup>69</sup> that reproduction is not a "major life activity" under the ADA, and thus impairments relating to reproduction, such as infertility, are not covered disabilities.<sup>70</sup> Moreover, the court held that a distinction in an insurance plan refusing to cover treatment for infertility is not a disability-based distinction that violates the ADA.<sup>71</sup> Those courts holding that reproduction is a major life activity, and that therefore infertility *does* constitute a covered disability under the ADA, would presumably have reached a contrary result and held that the insurance provision constituted a disability-based distinction.

Therefore, before one can determine whether a distinction or exemption in a health care plan constitutes a disability-based distinction in violation of the ADA, one must first determine whether it applies to a covered disability.

### C. Physical-Mental Health Distinctions

A major dispute with respect to disability-based distinctions involves health insurance plans that provide greater coverage for physical health care than for mental health care. The EEOC has opined that distinctions in benefits between treatment for physical and mental health conditions are not disability-based because they apply "to the

---

have a disability under the ADA), and *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 474 (D. Kan. 1996) (holding that a plaintiff who suffered from backaches and nausea as a result of her pregnancy did not have a disability under the ADA).

67. *Compare Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996) (holding that infertility is a disability under the ADA because it substantially limits the major life activity of reproduction), *Erickson v. Board of Governors of State Colleges & Univs. for Northeastern Univ.*, 911 F. Supp. 316, 323 (N.D. Ill. 1995) (stating that "[p]laintiff's allegation that her infertility is a physical impairment that substantially limits the major life activity of reproduction states a claim under the ADA"), and *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995) (reproduction constitutes a major life activity under the ADA), with *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 111 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996) (holding that infertility does not constitute a disability under the ADA because reproduction is not a major life activity).

68. See *supra* notes 52-54 and accompanying text.

69. *Krauel*, 915 F. Supp. at 107-08.

70. *Id.* at 108.

71. *Id.*

treatment of a multitude of dissimilar conditions and . . . constrain individuals both with and without disabilities."<sup>72</sup>

The EEOC apparently has not decided if the same rationale applies with respect to long-term disability plans. In *EEOC v. CNA Insurance Cos.*,<sup>73</sup> the EEOC filed suit on behalf of an individual who claimed that her employer's long-term disability plan violated the ADA by providing benefits for physical disabilities until age sixty-five, while providing benefits for mental and nervous disorders for only two years.<sup>74</sup> The EEOC had unsuccessfully sought a preliminary injunction until it had investigated the merits of the claim.<sup>75</sup> Thus, the EEOC did not have the opportunity to decide the issue in the context of that case, and to date it has not decided the issue in any other context.

In other cases, however, differentials between physical and mental health care in long-term disability plans have been recognized to violate—or to possibly violate—Title I. In *Harris v. City of Phoenix*,<sup>76</sup> the parties entered into a consent decree with respect to the claim that Phoenix's long-term disability policy violated the ADA by offering coverage to eligible employees with physical disabilities until age seventy-five, while limiting coverage to eligible employees with mental disabilities to twenty-four months.<sup>77</sup> Pursuant to the consent decree, the city agreed to eliminate the distinction, to reinstate the plaintiff's long-term disability benefits retroactively, and to pay the plaintiff's attorneys' fees.<sup>78</sup>

The plaintiff in *Harris* argued that long-term disability insurance is different from health insurance in that disability benefits, unlike health insurance benefits, are paid out as a percentage of the employee's salary and not on an individual claim basis. Thus, in *Harris*, the plaintiff argued that differences between benefits for mental and physical disabilities in long-term disability policies *do* violate Title I even if such differentials in health insurance policies do not violate Title I.<sup>79</sup>

---

72. *Interim Guidance*, *supra* note 42, at E-2. Note, however, that an employer could not selectively apply a nondisability-based insurance distinction only to persons with disabilities, such as by applying a plan limit on "eye care" only to an employee seeking treatment for a vision disability. *Id.*

73. 96 F.3d 1039 (7th Cir. 1996).

74. *Id.* at 1041.

75. *Id.* at 1041-42.

76. No. CIV-95-0361 (D. Ariz. May 1, 1996) (consent decree).

77. *Id.* at 1.

78. *Id.* at 3.

79. *Id.* at 1.

In *Esfahani v. Medical College of Pennsylvania*,<sup>80</sup> the plaintiff alleged that the distinction between physical and mental benefits in his employer's long-term disability plan was "arbitrary, discriminatory and without scientific basis."<sup>81</sup> The court found that the plaintiff had "adequately alleged" that the plan's distinctions between the types of benefits "are not based on legitimate grounds"<sup>82</sup> and remanded the case for further proceedings.<sup>83</sup> The *Esfahani* court recognized that distinctions between mental and physical health care benefits in long-term disability plans may, in some circumstances, violate Title I.<sup>84</sup>

The analysis with respect to whether distinctions between physical and mental health benefits in long-term disability plans violate the ADA is problematic. On the one hand, it can be argued that only people who are disabled require and receive long-term disability benefits, and therefore *all* distinctions made with respect to such benefits are disability-based and will violate the Act unless supported by actuarial data showing the necessity for such distinctions.<sup>85</sup> On the other hand, it can be argued that the ADA does not require that benefits provided to one group of people with disabilities must be provided to another group of people with disabilities, and therefore any distinctions made between benefits for persons with different types of disabilities are not discriminatory in violation of the Act.<sup>86</sup> It will be interesting to see how the courts, and the regulatory agencies, ultimately balance these conflicting approaches.

As the Seventh Circuit noted in *EEOC v. CNA Insurance Cos.*,<sup>87</sup> "the issue of parity among physical and mental health benefits is one that is still in the legislative arena."<sup>88</sup> The legislature has now addressed this issue in the recently enacted Mental Health Parity Act of 1996.<sup>89</sup> The Mental Health Parity Act, which is to take effect on January 1, 1998,<sup>90</sup> will apply to group health plans.<sup>91</sup> It will prevent life-

---

80. 919 F. Supp. 832 (E.D. Pa. 1996).

81. *Id.* at 836.

82. *Id.*

83. *Id.* The court denied portions of this motion. *Id.*

84. *Id.*

85. See *Interim Guidance*, *supra* note 42, at E-3 (stating that *one* of the ways that a defendant can show that a "challenged disability-based insurance distinction is not a subterfuge" is by presenting actuarial data to show that the distinction is unnecessary).

86. For a discussion of this issue, see TUCKER & GOLDSTEIN, *supra* note 60, at 21:1-21:46.

87. 96 F.3d 1039 (7th Cir. 1996).

88. *Id.* at 1044.

89. 42 U.S.C. § 300gg-5 (1996).

90. *Id.* This section applies with respect to group health plan years beginning on or after January 1, 1998.

91. *Id.*

time caps from being imposed on mental health benefits in a group health plan if physical benefits are not similarly capped in that plan.<sup>92</sup> Similarly, the Act will prevent a group health plan from placing annual limits on mental health benefits unless the plan imposes the same annual limits on substantially all medical and surgical benefits covered by the plan.<sup>93</sup> The Act does, however, provide an exemption for small employers having less than fifty-one employees.<sup>94</sup> Moreover, the Act does not apply if its application would cause the cost of insurance to increase by more than one percent.<sup>95</sup>

The Mental Health Parity Act does little to limit disparities between physical and mental health benefits. It does not even apply if insurance costs would rise more than one percent.<sup>96</sup> Even when it does apply, the Act merely prevents large employers that have insurance policies providing both physical and mental health benefits from having lifetime or annual caps—in terms of years or dollars—on mental health benefits that are not also imposed on physical health benefits.<sup>97</sup> What the Act does *not* cover is significant.

First, the Act does *not* require employers to provide *any* mental health benefits for their employees.<sup>98</sup> The Act expressly does not require “a group health plan (or health insurance coverage offered in connection with such a plan) to provide any mental health benefits.”<sup>99</sup> Thus, an employer could maintain an insurance plan that covers physical impairments but provides no mental health benefits at all. Alternatively, an employer could arguably have two separate health plans—one providing benefits for physical impairments and the second providing benefits for mental health care. If the employer has

---

92. “If the plan or coverage does not include an aggregate lifetime limit on substantially all medical and surgical benefits, the plan or coverage may not impose any aggregate lifetime limit on mental health benefits.” *Id.* § 300gg-5(a)(1)(A).

93. “If the plan or coverage does not include an annual limit on substantially all medical and surgical benefits, the plan or coverage may not impose any annual limit on mental health benefits.” *Id.* § 300gg-5(a)(2)(A).

94. *Id.* § 300gg-5(c)(1). The Act defines a small employer as “an employer who employed an average of at least 2 but no more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year.” *Id.* § 300gg-91(e)(4).

95. *Id.* § 300gg-5(c)(2). “This section shall not apply with respect to group health plan (or health insurance coverage offered in connection with a group health plan) if the application . . . results in an increase in the cost under the plan (or for such coverage) of at least 1 percent.” *Id.*

96. *Id.*

97. See *supra* note 92 and accompanying text.

98. See 42 U.S.C. § 300gg-5(b)(1) (providing that nothing in the Act shall be construed as requiring a group health plan to provide any mental health benefits).

99. *Id.*

two separate plans, it is arguable that the Mental Health Parity Act would not apply.<sup>100</sup>

Second, the Act expressly provides that it does not govern with respect to any terms or conditions relating to mental health benefits other than lifetime caps relating to benefits or annual limits.<sup>101</sup> Thus, the Act provides that it does not cover issues such as cost sharing, limits on numbers of visits or days of coverage, or requirements pertaining to medical necessity for mental health treatment.<sup>102</sup> Accordingly, an employer's group health plan could cover up to a certain percentage (say, fifty percent) of the costs of mental health care, even though the plan might cover a higher percentage (say, one hundred percent) of the cost of physical health care. The percentage goes to cost sharing and is not a lifetime annual cap in terms of years or dollars.

In actual effect, therefore, the Mental Health Parity Act is likely to do little or nothing to resolve the issue of parity among physical and mental health benefits.<sup>103</sup>

#### D. Benefit Caps

Another issue with respect to disability-based distinctions involves annual benefit caps. The EEOC takes the position that yearly or lifetime benefit caps applied to all health or disability plan participants are permissible since such caps are not used almost exclusively with respect to treatment for a particular disability and thus are not disability-based.<sup>104</sup> For example, a policy that establishes a maximum benefit of \$20,000 per year for medical care would not violate the ADA.<sup>105</sup> An annual or lifetime cap tied to a specific disabling condition, such as

---

100. See *id.* §§ 300gg-5(a)(1), (2) (providing that the Act only applies "in the case of a group health plan . . . that provides both medical and surgical benefits and mental health benefits").

101. *Id.* § 300gg-5(b)(2).

102. *Id.*

103. Nor will the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified at 42 U.S.C. § 702(a)(2)(A), (B) (1996)), assist in ensuring health insurance benefits for mental illness. 110 Stat. 1936. Section 702(a)(1) of that Act provides that a group health plan may not establish rules for eligibility or continued eligibility based on, *inter alia*, health status, "mental condition (including both physical and mental illnesses)," medical history, or genetic information. *Id.* While this proviso will prevent some forms of discrimination in the insurance context against persons with disabilities, the Act does not require group plans to "provide particular benefits," nor does the Act prevent group plans "from establishing limitations or restrictions on the amount, level, extent, or nature of the benefits or coverage for similarly situated individuals." *Id.*

104. *Interim Guidance, supra* note 42, at E-2.

105. See *id.* (explaining, through an example, that as long as the "cap does not single out a specific disability, discrete group of disabilities, or disability in general," such a cap is not a disability-based distinction that violates the ADA).



AIDS, however, is likely to violate the ADA, according to the EEOC.<sup>106</sup>

Much of the litigation in this area has involved allegations that an employer enacted a lower cap on benefits for AIDS-related illnesses than for other catastrophic diseases or illnesses.<sup>107</sup> The EEOC first dealt with this issue in the 1993 case of *Donaghey v. Mason Tenders District Council Trust Fund*.<sup>108</sup> The charging party alleged that the respondent construction union violated the ADA when, on July 1, 1991, it "changed its health insurance plan to explicitly exclude payment for expenses arising from HIV infections, AIDS, and/or AIDS[-]related complexes."<sup>109</sup> The New York District Director of the EEOC found that the ADA had been violated.<sup>110</sup>

The EEOC has entered into numerous settlement agreements or consent agreements that have provided relief to individuals whose benefits for HIV-related conditions were limited and in which insurers agreed to change their practices and policies with respect to AIDS

---

106. *Id.*

107. See, e.g., *EEOC v. Lee Data Corp.*, No. CV-94-3875 (C.D. Cal. Settlement Order entered Oct. 10, 1995) (the company agreed to raise a \$100,000 cap on lifetime health care benefits for treatment of AIDS related illnesses to \$1 million; the company also agreed to pay approximately \$115,000 in unpaid medical expenses and \$5,000 in compensatory damages to the estate of the insured); *EEOC v. Laborers Dist. Council Bldg. & Constr. Health & Welfare Fund*, No. CA-94-3971 (E.D. Pa. Consent Agreement entered into Dec. 23, 1994) (approving a consent agreement whereby the defendant agreed to pay the AIDS Law Project of Pennsylvania \$42,500 on behalf of one plaintiff, pay another plaintiff's medical bills in the amount of \$1,209, to delete its maximum benefit limitation of \$10,000 with respect to AIDS-related illnesses and to provide the same coverage for AIDS-related illnesses as it does for other major medical illnesses); *EEOC v. Connecticut Refining Co.*, 4 NDLR ¶ 1 (April 13, 1994) (conciliation agreement announced March 1994 whereby the defendant agreed to lift a cap placed on insurance coverage for AIDS-related expenses); *EEOC v. Allied Servs. Div. Welfare Fund*, 4 NDLR ¶ 1 (October 27, 1993) (settlement entered into in September 1993 whereby the defendant agreed to rescind a \$5,000 lifetime cap it had placed on AIDS-related expenses); *Estate of Kadinger v. IBEW Local 110*, 63 Empl. Prac. Dec. (CCH) ¶ 42 (D. Minn. 1993) (the defendant agreed to pay \$100,000 to the plaintiff's estate and to remove the cap on AIDS benefits). Additionally, in 1994, the Gage Company in Michigan agreed to delete its \$5,000 benefit limitation relating to AIDS-related illnesses from its medical reimbursement plan. *EEOC v. The Gage Co.*, 4 NDLR ¶ 8 (EEOC Aug. 17, 1994).

108. *Text of EEOC District Director's Determination in Charge No. 160-93-0419*, Jan. 28, 1993, Daily Lab. Rep. (BNA) No. 25, at D-1 (Feb. 9, 1993).

109. *Id.*

110. *Id.* Subsequently, a district court denied Mason Tenders' motion for summary judgment. The court rejected Mason Tenders' argument that, as a self-insured, union-management welfare fund, it is not an employer and thus is not subject to the ADA. In an oral opinion, the court "agreed that there was 'no evidence' that Congress meant to exclude such plans from ADA coverage and . . . rejected the fund's claim that ERISA preempted such coverage." The Disability Law Reporter Service, December 1993, at 18 (citing *Mason Tenders v. Donaghey*, No. 93-CIV-1154 (JES) (S.D.N.Y. November 19, 1993) (Sprizzo, J., oral opinion)).

coverage.<sup>111</sup> Under the EEOC's guidelines, such restrictions are clearly disability-based distinctions that must be analyzed to see if they constitute an impermissible subterfuge to violate the ADA.

While the EEOC has been active in this area, to date the courts have not really addressed the question of whether such limits violate the Act. The EEOC's analysis is well reasoned and in accord with the intent and spirit of the ADA, however. It is difficult to envision most courts rejecting that analysis.

### *E. Disability and Service Retirement Plans*

Another significant issue involves distinctions in employee benefits between service and retirement plans. As defined by the EEOC, a disability retirement plan "provides a lifetime income for an employee who becomes unable to work because of illness or injury, without regard to the employee's age."<sup>112</sup> A service retirement plan "provides a lifetime income to employees who have reached a minimum age stated in the plan (most commonly age 60 or age 65) and/or who have completed specified years of service with the employer."<sup>113</sup>

The EEOC opines that an employer does not violate ADA Title I when it only offers a service retirement plan and not a disability retirement plan, as long as the service retirement plan treats persons covered by the ADA in the same manner as other employees.<sup>114</sup> This is because neither plan makes distinctions based on disability. A service retirement plan is available to all employees who have attained a stated number of years of service, regardless of whether an employee has a disability.<sup>115</sup> In addition, a disability retirement plan is available to everyone who becomes unable to work due to injury or illness.<sup>116</sup>

The EEOC further opines that, if an employer does provide both a disability retirement plan and a service retirement plan, the employer would not be violating Title I if its disability retirement plan provided lower levels of benefits than the service retirement plan provided.<sup>117</sup>

The EEOC offers the following examples of how the two plans might differ:

---

111. See *supra* note 107 (citing the various settlement and consent agreements).

112. EEOC Notice, Questions and Answers About Disability and Service Retirement Plans Under the ADA, No. 915.002, at 1, May 11, 1995 (LRP Publications) (on file with the *DePaul Law Review*).

113. *Id.*

114. *Id.* at 2.

115. *Id.* at 2-3.

116. *Id.* at 3.

117. *Id.* at 2.

[A] service retirement plan might enable any employee with 20 or more years of service to retire with an annuity equal to 50% of the individual's highest annual compensation. But, the disability retirement plan, payable when illness or injury prevents the individual from continuing work, might provide an annuity equal only to 45% of the individual's highest annual compensation; . . . service retirees might receive periodic increases (for example, based on inflation or an increased return on invested pension funds) while disability retirees remain at a fixed benefit level; . . . a service retirement plan might disregard outside earnings while a disability retirement plan contains an outside earnings offset provision.<sup>118</sup>

According to the EEOC, none of the preceding examples would violate the ADA because service retirement plans and disability retirement plans are two separate benefits that serve different purposes and thus need not provide the same level of benefits.<sup>119</sup>

The EEOC's reasoning was followed in *Castellano v. City of New York*,<sup>120</sup> where the court found that the city did not violate the ADA by providing greater benefits to police officers who retired after twenty years of service than for those who retired due to disability.<sup>121</sup> Similarly, in *Graboski v. Guiliani*,<sup>122</sup> the court also followed the EEOC's reasoning when it held that fire fighters who retired under a disability plan were not entitled to share in increased benefits from pension fund investments that were available to fire fighters receiving benefits under a retirement plan.<sup>123</sup>

Once again, this is a question of line drawing. Is it appropriate under the ADA for an employer to treat people who retire due to disability in a different manner than the employer treats people who retire due to age or years of service? To this commentator, the distinction appears valid.

### F. Dependent Coverage

The final issue with respect to disability-based distinctions involves dependent coverage. An employer-provided insurance plan that provides coverage for an employee's dependents falls within Title I.<sup>124</sup> Thus, the same principles that apply under Title I to insurance cover-

---

118. *Id.*

119. *Id.*

120. 946 F. Supp. 249 (S.D.N.Y. 1996).

121. *Id.*

122. 937 F. Supp. 258 (S.D.N.Y. 1996).

123. *Id.* at 269-70.

124. See, e.g., *Interim Guidance*, *supra* note 42, at E-3.

age for employees also apply to coverage for dependents.<sup>125</sup> Accordingly, a provision in a health insurance plan that limits dependent coverage based on disability would constitute a disability-based distinction that may violate the ADA.

The EEOC opines, however, that the ADA does not require that an employer provide the same level or scope of health insurance for dependents that it provides for employees.<sup>126</sup> Thus, the EEOC opines that an employer-sponsored health insurance plan could permissibly provide prescription drug coverage for employees but not for dependents or could specify a higher benefit cap for employees than for dependents.<sup>127</sup> The EEOC's reasoning appears sound and in accord with Title I's purpose of protecting employees and job applicants from discriminatory treatment.

### G. Subterfuge

As previously explained, an insurance or benefit plan cannot be a subterfuge to circumvent the ADA's purposes.<sup>128</sup> What conduct or policies will be held to constitute a "subterfuge" to circumvent the intent of the ADA is a matter of interpretation. The EEOC has defined "subterfuge" as a "disability-based disparate treatment that is not justified by the risk or costs associated with the disability."<sup>129</sup> The EEOC suggests several ways to prove that a challenged disability-based distinction is not a subterfuge. According to the EEOC, a disability-based distinction is not a subterfuge if:

1. the defendant can "prove that it has not engaged in the disability-based disparate treatment alleged;"<sup>130</sup> or
2. "the disparate treatment is justified by legitimate [current and accurate] actuarial data, or by actual or reasonably anticipated experience, and . . . conditions with comparable actuarial data and/or experience are treated in the same fashion;"<sup>131</sup> or
3. no nondisability-based plan changes could be made to ensure that the challenged plan "satisfies the commonly accepted or legally

---

125. *Id.*

126. *Id.*

127. *Id.*

128. See *supra* notes 40-42 and accompanying text.

129. See, e.g., *Interim Guidance*, *supra* note 42, at E-3; see also *United States v. State of Illinois*, No. 93-C-7741, filed Dec. 1993 (consent decree entered Aug. 1995) (reported at 6 NDLR Highlights (Sept. 14, 1995)).

130. *Interim Guidance*, *supra* note 42, at E-3.

131. *Id.* (footnote omitted).

required standards for the fiscal soundness of such a insurance plan;"<sup>132</sup> or

4. no nondisability-based plan change could be made "to prevent the occurrence of an unacceptable change either in the coverage or the health insurance plan, or in the [increased] premiums charged for the health insurance plan"<sup>133</sup> or in increased co-payments or deductibles under the plan; or

5. denial of coverage is warranted in that the treatment does not provide any benefit (unless the plan covers treatment of other conditions having no medical value).<sup>134</sup>

Determining exactly what constitutes a subterfuge in violation of the ADA will involve an individualized, case-by-case analysis. There are, however, several existing areas of controversy surrounding the subterfuge issue in the context of Title I.

### *1. Date of Plan's Enactment*

The first question is whether insurance plans established prior to the ADA's enactment can be found to constitute a subterfuge in violation of the ADA. In *Public Employees Retirement System of Ohio v. Betts*,<sup>135</sup> the United States Supreme Court held that provisions in a state retirement plan did not constitute a subterfuge in violation of the Age Discrimination in Employment Act of 1967 ("ADEA")<sup>136</sup> because the retirement plan was enacted prior to the enactment of the ADEA.<sup>137</sup>

In *Modderno v. King*,<sup>138</sup> the District of Columbia Circuit followed the reasoning of *Betts* when analyzing a case under ADA principles. In *Modderno*, an insurance plan imposed a \$75,000 lifetime cap on benefits for mental health care but no cap on benefits for physical care.<sup>139</sup> The District of Columbia Circuit held that the cap did not violate section 504 of the Rehabilitation Act,<sup>140</sup> which is to be interpreted in accord with ADA principles.<sup>141</sup> In so ruling, the court relied

---

132. *Id.*

133. *Id.*

134. *Id.* at E-3, E-5.

135. 492 U.S. 158 (1989).

136. 29 U.S.C. §§ 621-634 (1994).

137. *Betts*, 492 U.S. at 167.

138. 82 F.3d 1059 (D.C. Cir. 1996).

139. *Id.* at 1060.

140. Section 504 was amended by the Rehabilitation Act Amendments of 1992 to incorporate the standards of Title I. 29 U.S.C. § 794.

141. *Modderno*, 82 F.3d at 1065 (interpreting section 504 by applying the standards under ADA Title I).

on *Betts*. Because the plan was enacted before the ADA, it was a bona fide insurance plan, not a subterfuge to evade the ADA.

The court's reasoning in *Modderno* is in contravention of the legislative history of the ADA and the EEOC's interpretation of section 501(c) of the ADA. The EEOC explains that the legislative history of the ADA expressly states that "subterfuge is to be determined 'regardless of the date an insurance or employer benefit plan was adopted.'"<sup>142</sup> Thus, the EEOC states that the ADA does not provide a "safe harbor" for health insurance adopted prior to the ADA's enactment on July 26, 1990.<sup>143</sup> The EEOC opines that the *Betts* rationale does not apply in Title I health insurance cases.<sup>144</sup>

In *Parker v. Metropolitan Life Insurance Co.*,<sup>145</sup> the Sixth Circuit followed the EEOC's reasoning and rejected the *Modderno* court's application of the *Betts* "prior enactment" rationale in ADA cases.<sup>146</sup> The Sixth Circuit noted the legislative history indicating that the *Betts* rationale should not apply under the ADA.<sup>147</sup> To date, therefore, there is a split of authority with respect to the question of whether the ADA provides a safe harbor for health insurance (or disability plans) enacted prior to the ADA's enactment.

## 2. Analysis of "Subterfuge": Part II of the *Betts* Dispute

In *Betts*,<sup>148</sup> the Supreme Court defined subterfuge under the ADEA as requiring a "scheme" used to discriminate "in some non-fringe benefit aspect of the employment relationship."<sup>149</sup> The EEOC takes the position that the *Betts* rationale does not apply to Title I cases<sup>150</sup> because Title I, unlike the ADEA, expressly provides that employers may not discriminate with respect to the "fringe benefits" of employment.<sup>151</sup>

---

142. *Interim Guidance*, *supra* note 42, at E-2. The EEOC cites the following legislative history: H.R. REP. NO. 101-485, pt. 2, at 136-38 (1990); H.R. REP. NO. 101-485, pt. 3, at 70-71 (1990); S. REP. NO. 101-116, at 85 (1989).

143. *Interim Guidance*, *supra* note 42, at E-2.

144. *Id.* at E-3 n.10.

145. 99 F.3d 181 (6th Cir. 1996), *vacated*, 6 Am. Disabilities Cas. (BNA) 547 (6th Cir. 1997).

146. *Id.* at 192-93.

147. *Id.* at 190-91. The court in *Parker* actually discussed the "safe harbor" issue in the context of Title III, rather than Title I. Nevertheless, the *Parker* court followed the EEOC's reasoning under Title I. *Id.*

148. 492 U.S. 158 (1989).

149. *Id.* at 181.

150. *Interim Guidance*, *supra* note 42, at E-2.

151. Section 12112(b)(2) provides that an employer cannot enter into a contractual relationship with "an organization providing fringe benefits to an employee" if the fringe benefits are provided in a manner that discriminates on the basis of disability. 42 U.S.C. § 12112(b)(2) (1994).

Some courts have rejected the EEOC's analysis and have applied the *Betts* rationale to insurance cases filed under Title I. In *Krauel v. Iowa Methodist Medical Center*,<sup>152</sup> the Eighth Circuit upheld a lower court's determination that an exclusion for the treatment of infertility in a health insurance plan was not a subterfuge to evade the ADA. Following *Betts*, the Eighth Circuit held that the "subterfuge" test under the ADA requires proof of employment discrimination outside the insurance plan.<sup>153</sup> Since the plaintiff conceded that she suffered no such discrimination, the Eighth Circuit held that the infertility exclusion in the insurance plan was not a subterfuge.<sup>154</sup>

Similarly, in *Piquard v. City of East Peoria*<sup>155</sup> the district court followed the *Betts* definition of "subterfuge."<sup>156</sup> The court held the subterfuge proviso inapplicable where police officers, who were not permitted to participate in the city's police pension fund because of their disabilities, "[did] not allege that they [were] being discriminated against in a non-fringe benefit area of employment."<sup>157</sup> The court seemed to go out of its way to reject the EEOC's definition of "subterfuge"; the EEOC's definition applies to health insurance plans and the issue in *Piquard* involved a pension plan.<sup>158</sup>

To date, therefore, a conflict remains with respect to the question of whether, to show subterfuge under Title I, the plaintiff must allege discrimination in a non-fringe benefit aspect of employment. The legislative history of the ADA, however, indicates that the *Betts* reasoning is not applicable to cases arising under the ADA.

### 3. *Burden of Proving Subterfuge*

If an employer-sponsored health insurance plan is challenged as being a subterfuge, the EEOC takes the position that the defendant-employer bears the burden of proving the plan is *not* a subterfuge, in accord "with the well-established principle that the burden of proof should rest with the party who has the greatest access to the relevant facts."<sup>159</sup> The EEOC opines that since individual employees or job

---

152. 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

153. *Id.* at 111.

154. *Id.*

155. 887 F. Supp. 1106, 1129 (C.D. Ill. 1995).

156. *Id.* at 1122-25.

157. *Id.* at 1125.

158. *Id.*

159. *Interim Guidance*, *supra* note 42, at E-3.

applicants have no access to the actuarial data of insurers, they are not in a position to bear the burden of proving subterfuge.<sup>160</sup>

In *Betts*, however, the Supreme Court held that a plaintiff who files an action under the ADEA has the burden of proving that a benefit plan is a subterfuge.<sup>161</sup> At least one court has applied the *Betts* rationale under the ADA.<sup>162</sup> This issue, therefore, also remains in dispute. The EEOC's analysis clearly seems to be the appropriate one.

#### H. Case Example: Cochlear Implants

To illustrate how the insurance analysis works under Title I, I will analyze whether restrictions on coverage for cochlear implants in an employer-sponsored health insurance plan violate that Title.<sup>163</sup>

An emerging issue with respect to insurance coverage under Title I involves coverage for cochlear implants. A cochlear implant is an electronic prosthesis implanted into the inner ear that partially performs the functions of the cochlea—that part “of the inner ear that transduces sound waves into coded electrochemical signals.”<sup>164</sup> The cochlear implant is intended to remedy many of the effects of nerve deafness, the most common form of deafness.<sup>165</sup> Twenty-two elec-

---

160. *Id.* In *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958 (8th Cir. 1995), the court implicitly evidenced its agreement with the EEOC's position. In that case, the plaintiff alleged that her employer's insurance plan violated Title I by denying coverage for chemotherapy for breast cancer under the reasoning that such treatment was experimental. *Id.* at 959. In reversing the denial of plaintiff's motion for a preliminary injunction, the Eighth Circuit noted that Bodine Aluminum had not presented any evidence to refute the plaintiff's assertion that the treatment was not experimental. *Id.* at 961. The Eighth Circuit stated:

We do not believe it is unfair to expect Bodine and its sophisticated health insurance providers to promptly provide some general evidence that [the treatment in dispute] is not an accepted therapy for breast cancers like Henderson's. After all, such coverage issues lie at the heart of a health insurance provider's expertise, and the evidence and cases show that the issue of [such treatment] for breast cancer has been on the insurance industry's horizon for some years.

*Id.* at 961 (citation omitted).

In *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995), the court acknowledged the EEOC's reasoning and stated that it would apply “with equal force” to a pension plan situation; however, the court noted that it did not have to determine the burden of proof issue in that case since the court had already determined that no subterfuge could exist where a plan was enacted prior to the ADA's enactment. *Id.* at 1125-26.

161. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 182 (1989).

162. *See, e.g., Moddermo v. King*, 82 F.3d 1059 (D.C. Cir. 1996) (placing the burden on the plaintiff to prove subterfuge).

163. For example, Intergroup of Arizona's benefit plan provides: “Cochlear implants are . . . excluded [from coverage].” INTERGROUP OF ARIZONA, INC., EVIDENCE OF COVERAGE (insurance policy on file with the *DePaul Law Review*).

164. Thomas Balkany, M.D., *A Brief Perspective on Cochlear Implants*, 328 NEW ENG. J. MED. 281, 281 (1993).

165. *Id.*



trodes are implanted into the inner ear and are attached via a magnet and wires to an external processor.<sup>166</sup> In addition to the processor, the implanted person wears a microphone to pick up sound. The external processor sends coded information to the prosthesis in the inner ear, which is a receiver-stimulator. The receiver-stimulator converts the coded information into electrical signals, which are passed to the electrodes. The electrodes stimulate hearing nerve fibers, and artificial "sound" is transmitted directly to the brain, bypassing the nonfunctioning portion of the ear.<sup>167</sup>

A cochlear implant is *not* a hearing aid, as the Food and Drug Administration ("FDA") and the American Medical Association expressly recognize.<sup>168</sup> The implant involves major surgery and continuous training and "remapping" of the processor to which the implant attaches. Only people who are profoundly or very severely deaf receive cochlear implants (pursuant to FDA rules)—the implant serves no other purpose other than to help profoundly or very severely deaf people, who cannot benefit substantially from hearing aids, to hear.

Further, cochlear implants are not experimental. Over 8,000 people in the United States have received cochlear implants, including several thousand children.<sup>169</sup> This number is expected to increase due to greatly expanded FDA approval with respect to the implantation of both children and adults. Many thousands of individuals in other countries have received cochlear implants.

An exemption for cochlear implants in a health insurance plan, therefore, is clearly a disability-based distinction, as explained in the EEOC's guidelines, since it is a nonexperimental medical procedure that singles out a particular disability—deafness. This is only the first part of the analysis, however. It next becomes necessary to analyze whether this disability-based distinction for cochlear implants violates Title I in that it constitutes a subterfuge to circumvent the purposes of the ADA.

I will assume that the insurance plan exempting coverage for cochlear implants is a bona fide insurance plan that complies with state law. Therefore, according to the EEOC's analysis, the insurer must then show one of the following:

---

166. *Id.*

167. See, e.g., Noel L. Cohen et al., *A Prospective, Randomized Study of Cochlear Implants*, 328 NEW ENG. J. MED. 233, 233 (1993).

168. Balkany, *supra* note 164, at 281.

169. This information was provided to the author by Cochlear Corporation and Advanced Bionics, Inc.

1. The insurer may show that the exemption is justified by legitimate current actuarial data or by reasonably anticipated experience and that conditions with comparable actuarial data or experience are treated in the same manner.<sup>170</sup> It is hard to see how an insurer could establish such justification with respect to cochlear implants, given that analogous treatments that are equally or more expensive and more prevalent (such as artificial hip joints and pacemakers) are routinely covered.<sup>171</sup>

2. The insurer may show that the exemption is necessary for the fiscal soundness of the insurance plan.<sup>172</sup> This would be virtually impossible for the insurer to establish. Given the relatively small number of profoundly or severely deaf people in this country, and particularly in a given area of the country, it seems impossible to see how an insurer could become insolvent by paying for a minimal number of cochlear implants.

3. The insurer may show that the exemption is necessary to avoid drastic increases in insurance premiums or drastic reductions in the numbers of people whom the insurer is either able to insure or who wish to be insured by the insurer.<sup>173</sup> Again, given the relatively small number of people who will require cochlear implants in a given area, this burden would be almost impossible to sustain.

---

170. *Interim Guidance*, *supra* note 42, at E-3.

171. Like artificial hip joints and pacemakers, cochlear implants are prosthetic devices. A cochlear implant is implanted into the ear to simulate or regulate "hearing"; a pacemaker is implanted into the heart to simulate or regulate the heartbeat; an artificial hip joint is implanted into the hip to simulate and regulate hip movement. The average range of costs for a pacemaker, including the equipment, surgery, medical and hospitalization costs, and follow-up care, is estimated at between \$17,000 and \$55,000 (and an individual may receive numerous pacemakers over a long period). The average range of costs for an artificial hip joint, including the artificial joint, surgery, hospitalization, rehabilitation costs, and follow-up care, is estimated at between \$20,000 and \$45,000. Both procedures can cost significantly more in special situations. The average cost of a cochlear implant, including the equipment, surgery, medical and hospitalization costs, and follow-up training, is estimated at between \$35,000 and \$40,000.

It is estimated that several million people in the United States have received pacemakers; the number rises substantially each year. It is further estimated that between 120,000 and 170,000 artificial hip joints are implanted in the United States each year. The number of people in the United States who are or will be eligible to receive cochlear implants is only a small fraction of the number of people eligible to receive pacemakers or artificial hip joints. There are only an estimated two million profoundly deaf people in the United States, and probably about the same number or less of severely hearing-impaired people who cannot benefit substantially from hearing aids. Only some of those individuals are candidates for cochlear implants.

The foregoing information regarding artificial hip joints and pacemakers is based on actuarial data provided to the author by an insurance company representative.

172. *Interim Guidance*, *supra* note 42, at E-3.

173. *Id.*

4. The insurer may show that cochlear implants do not provide any benefit to people who are deaf.<sup>174</sup> Since there are several thousand deaf people in this country receiving very substantial benefits from cochlear implants,<sup>175</sup> the insurer could not meet this burden.

Following this analysis, it is highly unlikely that an exemption for cochlear implants in a health insurance plan would withstand scrutiny under the ADA. Such an exemption should almost certainly constitute an impermissible subterfuge to avoid the purposes of the ADA.

## II. TITLE III—PUBLIC ACCOMMODATIONS

An individual who claims to have been discriminated against by virtue of provisions in an employer-sponsored insurance plan may file suit against the employer (under Title I),<sup>176</sup> the private insurance provider (under Title III),<sup>177</sup> or both. An individual whose health or disability insurance is not provided via an employment relationship, but is provided via contract between the individual and a private insurance carrier, can only file suit against the insurance carrier under Title III.

### A. Coverage Under Title III

As a preliminary matter, we must address the threshold issue of when an insurer falls within the coverage of Title III. Title III of the ADA prohibits discrimination on the "basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."<sup>178</sup> A public accommodation is defined as a "private entity that owns, leases (or leases to), or operates a place of public accommodation."<sup>179</sup> Title III contains a list of twelve categories of private entities that are public accommodations governed by the ADA.<sup>180</sup> Several examples of covered entities are listed in each category.<sup>181</sup>

---

174. *Id.*

175. The author is presently compiling data received from several hundred cochlear implant recipients and parents of cochlear implant recipients that evidences the enormous benefit that the majority of implantees receive from the implant. There are many publications explaining such benefits. See, e.g., Cohen *supra* note 167 (illustrating a survey demonstrating substantial beneficial results from the use of cochlear implants). The cochlear implant has enabled many deaf people to return to the work force. An in-depth analysis of this issue is beyond the scope of this Article.

176. See 42 U.S.C. §§ 12112-12117 (1994).

177. *Id.* §§ 12181-12189.

178. *Id.* § 12182(a).

179. 28 C.F.R. § 36.104 (1996).

180. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

181. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

To fall within Title III, a private entity *must* fall within one of those twelve categories,<sup>182</sup> although the examples given in each category are merely illustrative. One of the covered categories includes service establishments, defined as: “[a] laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.”<sup>183</sup>

The principal issue under Title III that this section of the Article will address is whether the list of twelve categories includes only physical structures that a person enters to obtain goods or services or whether the list also includes services provided by public accommodations even when clients or customers do not enter physical structures to obtain such goods or services.<sup>184</sup> Clearly Title III applies to insurance offices themselves because insurance offices are expressly listed as being covered.<sup>185</sup> But does Title III apply to services provided by insurers not involving access to insurance offices? This has been an issue of dispute under Title III in general, not just with respect to services provided by insurers.<sup>186</sup>

The Title III regulations promulgated by the Department of Justice (“DOJ”) indicate that Title III covers not only physical access to the offices of insurance providers, but also the provision of services, such as health or disability insurance benefits, offered by private insurance companies.<sup>187</sup> The DOJ’s Title III Technical Assistance Manual states:

[A] public accommodation may offer [an insurance] plan that limits certain kinds of coverage based on classification of risk, but may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.<sup>188</sup>

---

182. 42 U.S.C. § 12181(7).

183. *Id.* § 12181(7)(F); 28 C.F.R. § 36.104.

184. *See, e.g.,* Carparts Distrib. Ctr. v. Auto Wholesaler’s Ass’n of New England, 37 F.3d 12, 18-20 (1st Cir. 1994).

185. 42 U.S.C. § 12181(7).

186. *See Carparts*, 37 F.3d at 18-20.

187. 28 C.F.R. §§ 36.20-36.23.

188. U.S. DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL: COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES (Nov. 1993) § III-3.11000, at 19.

This clearly implies that Title III goes beyond mere access to insurance facilities.

Likewise, the First Circuit has held that Title III governs the activities of insurance companies, regardless of whether actual physical facilities are involved.<sup>189</sup> In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*,<sup>190</sup> the district court held that public accommodations under Title III are "limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein."<sup>191</sup> Thus, the district court held that a private company that operates a self-insured employee benefit plan was not a public accommodation within the meaning of Title III.<sup>192</sup> The First Circuit disagreed and reversed the district court's dismissal of the action, holding that the plain meaning of Title III evidences that public accommodations are not limited to actual structures.<sup>193</sup> The First Circuit noted:

By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. . . . It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.<sup>194</sup>

The First Circuit further noted that its interpretation is "consistent with the legislative history of the ADA"<sup>195</sup> and stated:

Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities

---

189. *Carparts*, 37 F.3d at 12.

190. 826 F. Supp. 583 (D.N.H. 1993), *rev'd*, 37 F.3d 12 (1st Cir. 1994).

191. *Id.* at 583.

192. *Id.* at 586.

193. *Carparts*, 37 F.3d at 19.

194. *Id.*

195. *Id.*

fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.<sup>196</sup>

Other courts have agreed. In *Parker v. Metropolitan Life Insurance Co.*,<sup>197</sup> the Sixth Circuit held that Title III "reach[es] the contents of the goods and services," including insurance coverage, regardless of whether physical facilities are at issue.<sup>198</sup> The Sixth Circuit stated:

It seems unlikely that Congress would leave the insurance industry virtually untouched by a statute that is designed to address "the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) ("Purpose"). There could hardly be a "good" or "service" more central to the day-to-day life of a seriously disabled person than insurance—for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society.<sup>199</sup>

Similarly, in *Kotev v. First Colony Life Insurance Co.*,<sup>200</sup> the court held that the protection of Title III goes beyond mere access to facilities and includes access to nondiscriminatory insurance coverage.<sup>201</sup> That court noted that section 501(c) of the ADA, which prohibits insurers from engaging in practices that constitute a subterfuge to avoid the ADA but allows insurers to limit coverage based on sound actuarial principles, would be unnecessary "if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage."<sup>202</sup>

Apparently, at least in the insurance context, the courts seem to have gotten past the "physical premises" argument, and thus insurers should be bound by Title III with respect to coverage issues. That brings us to the next issue: What kind of substantive analysis will be conducted under Title III to see if provisions in a health insurance or disability plan constitute a subterfuge in violation of the ADA?

---

196. *Id.* at 20.

197. 99 F.3d 181 (6th Cir. 1996), *vacated*, 6 Am. Disabilities Cas. (BNA) 547 (6th Cir. 1997).

198. *Id.* at 187.

199. *Id.* at 192-93.

200. 927 F. Supp. 1316 (C.D. Cal. 1996).

201. *Id.* at 1321.

202. *Id.* at 1322; *see also* *Doukas v. Metropolitan Life Ins. Co.*, 882 F. Supp. 1197 (D.N.H. 1996) (following *Carparts* and noting that the "broad wording" of Title III evidences that it "was intended to extend beyond mere access or availability of a good or service"); *Baker v. Hartford Life Ins. Co.*, No. 94-C-4416, 1995 U.S. Dist. LEXIS 14103, at \*8-9 (N.D. Ill. Sept. 28, 1995) (finding that the insurance company was subject to Title III despite the fact that plaintiff had no contact with the company's offices).

### B. Substantive Analysis Under Title III

Unlike the EEOC, which has promulgated comprehensive guidelines to assist in determining whether distinctions or exemptions in health insurance plans violates Title I,<sup>203</sup> the DOJ has not issued guidance indicating when such distinctions or exemptions should be held to violate Title III. An attorney with the DOJ has informed this commentator, however, that with respect to health insurance plans, the DOJ is following, and will continue to follow, the EEOC's guidelines.<sup>204</sup> Like the EEOC with respect to Title I, the DOJ has not yet taken any position with respect to when, or whether, distinctions or exemptions in long-term disability policies will violate Title III. To date, the courts have just begun to address these questions under Title III.<sup>205</sup>

### CONCLUSION

The relationship between the ADA and matters of insurance raises a multitude of questions. Numerous issues of dispute remain under Title I with respect to insurance coverage, including: (i) whether individuals can sue their former employers for allegedly discriminatory provisions in insurance or disability plans; (ii) whether the ADA provides a "safe harbor" for insurance or disability plans established prior to the ADA's enactment; (iii) whether distinctions in benefits between treatment for physical and mental health conditions in an insurance or disability plan constitute disability-based distinctions that may violate the ADA; (iv) whether, to prove subterfuge under section 501(c), a

---

203. See generally *Interim Guidance*, *supra* note 42.

204. Telephone Interview with Philip Breen, Esq., Special Litigation Counsel, Civil Rights Division, United States Dep't of Justice (Jan. 22, 1997).

205. See *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 193-94 (6th Cir. 1996), *vacated*, 6 Am. Disabilities Cas. (BNA) 547 (6th Cir. 1997). The Sixth Circuit appeared to follow the EEOC's reasoning. The court held that, on remand, the plaintiff will have to show that the alleged discriminatory distinction in a long-term disability plan (between mental and physical health coverage) is not justified by "sound actuarial principles" or "actual or reasonably anticipated experience" or "bona fide risk classification." The court noted:

It is not the role of the courts to write insurance policies. Title IV [of the ADA] clearly places a significant amount of discretion in the hands of insurance companies to write policies that are "consistent with state law." . . . Thus, . . . insurance practices, including the insurance industry's justification for its distinction between mental and physical disabilities, are therefore protected to the extent they are in accord with sound actuarial principles, reasonably anticipated experience and bona fide risk classification.

*Id.* at 194 (citation omitted).

In *Doukas*, the court determined that a factual issue existed with respect to the question of whether the insurer's denial of mortgage disability insurance to an individual with bipolar disorder was based on actual or reasonably anticipated experience relating to bipolar disorder. 882 F. Supp. at 1200-01.

plaintiff must have suffered discrimination in a non-fringe benefit aspect of employment; (v) whether the burden of proving or disproving subterfuge lies with the plaintiff or the defendant; and (vi) whether, and to what extent, coverage exclusions or benefit caps will constitute subterfuges in violation of the ADA.

All these areas of dispute, except the first and fourth, also apply with respect to Title III. Under Title III, however, it seems well settled that services provided by private insurers are covered under the ADA regardless of whether access to the insurer's premises is involved. A major area of concern under both Titles I and III, which to date no regulatory agency has addressed, is the extent—if any—to which long-term disability plans may be held to violate the ADA.

The underlying issue is one of policy. To what extent is the ADA intended to regulate—or have an impact on—the insurance industry? There are those who argue that insurance matters lie almost entirely outside the scope of the ADA, and that the insurance industry should be regulated solely by the states and not directly impacted by federal civil rights laws. Others argue that insurance coverage is central to the ability of persons with disabilities to integrate into mainstream society and, for this reason, is an important aspect of the ADA. The legislative history of the ADA, as well as section 501(c) of the Act, expressly recognizes that the ADA is intended to have *some* impact on the provisions of insurance benefits for people with disabilities. It remains to be seen how the policy disputes will be reconciled and what impact the ADA will have on insurance coverage.



